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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 809

MARY GAREE and COSTA B. GAREE,
(Plaintiffs) Respondents,

vs.

EDWARD McDONELL,
(Defendant) Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION and BRIEF.

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In The

Supreme Court of the United States

October Term, A. D. 1940.

No.

MARY GAREE and COSTA B. GAREE,
(Plaintiffs) Respondents,

vs.

EDWARD McDONELL,
(Defendant) Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION.

To the Honorable:
The Supreme Court of the United States.

Your petitioner, Edward McDonell, respectfully petitions the Court for a writ of *certiorari* to be issued from this Court to the United States Circuit Court of Appeals for the Seventh Judicial Circuit of the United States to reverse a judgment of that Court affirming a judgment of

the United States District Court for the Southern District of Illinois, Southern Division, in favor of the respondent, Mary Garee, for the sum of $3,000.00 and in favor of the respondent, Costa B. Garee for $690.00 against the petitioner, and also to reverse said judgment of the trial court.

JURISDICTION.

This suit was begun August 20, 1938, by respondents, citizens of the State of Ohio, against petitioner, a citizen of Illinois, residing in Bloomington in the Southern Division of the Southern District of said State, by complaint filed in the District Court to recover damages alleged to have been suffered by respondents through the negligent driving by petitioner of his automobile near Sabetha, Kansas, causing a collision between petitioner's and respondents' automobiles. Each respondent claimed $15,000.00 damages for personal injuries and respondent, Costa B. Garee, claimed $1,500.00 damages for injury to his motor vehicle (Tr. 2-10; R. 3-12). Trial was had in the District Court before a jury on October 23-26, 1939 (Tr. 35, 145; R. 55, 57). Verdict of jury for $3,000.00 in favor of respondent, Mary Garee, and for $690.00 in favor of respondent, Costa B. Garee, and judgment for same against petitioner (Tr. 146; R. 58). Appeal was taken and perfected from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit (Tr. 152, 154; R. 70, 73). A hearing was had in that Court and said Court rendered a judgment on December 11, 1940, affirming the judgment of the trial court (116 Fed. (2nd) 78). Prior to March 10, 1941, petition for *certiorari* was filed with the Clerk of this Court. The jurisdiction of this Court is invoked under Section 240A as amended of title 28 (now Section 347A) and Section 350 of title 28 of the United States Revised Statutes.

The question involved herein is of the utmost importance due to the large number of suits arising out of automobile accidents wherein one or more of the parties carry liability insurance. It is submitted that the gravity of the decision sought to be reversed, arises out of the chaotic maelstrom of decisions which construe the use in evidence of the insurance factor. There is a conflict between the decision in the case at bar and the decisions of other Circuit Courts of Appeals and the State Courts of Illinois on the same matter. (*Stewart & Company* v. *Newby,* 266 Fed. 287, 295; *Brooke* v. *Croson,* 58 F. (2nd) 855; *Clark* v. *Hasselquist, et al.,* 304 Ill. App. 41, 46, 47, 48; *Bishop* v. *Chicago Junction Ry. Co.,* 289 Ill. 63, 67; *McCarthy* v. *Spring Valley Coal Co.,* 232 Ill. 473, 479.)

QUESTION PRESENTED.

In an action to recover damages for petitioner's alleged negligence in an automobile collision where the evidence on both sides is close and conflicting, should a substantial verdict against petitioner and in favor of respondent, induced by proof that petitioner was insured, be permitted to stand?

STATEMENT.

This suit was commenced and concluded as shown herein under the sub-head of Jurisdiction. The evidence of liability and non-liability was close and conflicting (Tr. 113-118; R. 179-186). The main reason urged for a reversal of both judgments, was the denial by the trial court of petitioner's motion to withdraw a juror and continue the cause on account of the injection into the case by respondent's evidence that petitioner was insured and other prejudicial and incompetent evidence (Tr. 148; R. 61) by reason of which the verdicts of the jury were the result of prejudice and passion and not based upon competent evidence (Tr. 148-149; R. 62). Petitioner's chief

contention in the Circuit Court of Appeals was, that up to the time when petitioner's motion to withdraw a juror and continue the cause was denied, prejudicial evidence of insurance had been submitted to the jury without any waiver of the same on the part of petitioner. Petitioner urges that this portion of the record discloses that the trial court erred in failing to declare a mistrial.

On the trial of the case before a jury, after preliminary questions to the first witness and outside the hearing of the jury, there was a colloquy between Court and counsel whereby all connected with the case were warned, more or less, to avoid presenting to the jury any evidence that petitioner was insured against automobile accidents (Tr. 36; R. 80). Immediately counsel for respondent asked the witness: "Do you remember Mr. Pautz, insurance man at Sabetha?" (Tr. 37; R. 82). Then questioned the witness about going to the telegraph station at Sabetha after the accident with the insurance man and composing a telegram and sending it to respondent's insurance company, and repeatedly asking questions and receiving answers concerning insurance and the insurance company under the guise of having the witness tell what was contained in the telegram, and that petitioner stated the collision was petitioner's fault (Tr. 38-39; R. 83, 84, 85). Again, attorney for respondent asked: "In sending this telegram to the insurance company, did you tell them you had a serious accident?" (Tr. 39; R. 85).

Sometime after the accident, respondent and petitioner met at petitioner's home in Bloomington, Illinois, and over objection, the witness was requested to detail the conversation concerning propositions for settlement of the case bandied back and forth between petitioner and respondent, and how much respondent wanted for a set-

tlement that was never consummated, wherein evidence of petitioner's having been insured against automobile accidents was again presented to the jury (Tr. 41; R. 87). In respondent's testimony, the matter of petitioner's insurance was repeatedly testified to (Tr. 43-48; R. 90-97). This colloquy between the trial court and counsel for petitioner occurred: Petitioner's Attorney: "If the court please, I want to call your Honor's attention to the fact that notwithstanding the understanding with all of us that the matter (insurance) was not to be brought out, they constantly ask questions to bring out the thing that they agreed not to bring out." Then the trial court said: "That is true, it is out in the open so far as that is concerned and there is no way the court can avoid it" (Tr. 40, 41, 42; R. 86, 87). After the details of an attempted settlement between the parties were shown and an objection was sustained to another question, respondent's attorney said (outside the presence of the jury): "May the record show in our exception to the court's ruling to this last question, that we expect the answer to be that it was suggested by either the insurance company's adjuster or the lawyers" (Tr. 41; R. 87).

Thereupon petitioner moved the Court to withdraw a juror and continue the cause on account of respondent's prejudicial injection of petitioner's liability insurance into the case (Tr. 42; R. 88). Motion was overruled. Petitioner made a motion for a new trial on account of the admission of the testimony on behalf of respondents and permitting respondent to get before the jury information to the effect that petitioner was insured. Motion for a new trial was denied (Tr. 148, 149, 151; R. 61, 63, 68). The same matters were assigned for error in the Circuit Court of Appeals (Tr. 153; R. 215).

REASONS FOR ALLOWANCE OF WRIT.

I.

The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same matter and decides an important question of a local law in a way probably in conflict with applicable decisions.

II.

The evidence upon the subject of petitioner's negligence and the contributory negligence of respondent was conflicting and petitioner had the right to have that issue fairly submitted to the jury uninfluenced by any other issue.

III.

The evidence and questions concerning the petitioner's liability insurance did not tend to prove any matter properly before the jury and was produced by repeated and purposeful questioning by respondents' attorneys and caused the substitution of the issue of liability insurance for the issues of negligence and contributory negligence.

IV.

Although repeatedly warned by the trial court to refrain from producing before the Jury evidence of petitioner's liability insurance, respondents repeatedly violated the warning and asked questions calculated to produce that evidence, and directly referred in their questions to petitioner's insurance. Showing counsel's purpose to accomplish that result, respondents' attorney stated: "* * * we expect the answer to be that it was suggested by either the insurance company's adjuster or the lawyers" (Tr. 41; R. 87).

V.

The injection of the false issue was not information innocently volunteered or produced by accidental means or by inadvertence.

VI.

The failure of the trial court to allow petitioner's motion to withdraw a juror and continue the cause, and again to allow petitioner's motion for a new trial and follow the same by judgment and the affirmance of that judgment by the Circuit Court of Appeals, has deprived the petitioner of a trial of his case upon the issues made by the pleadings therein.

Wherefore, petitioner prays that the writ of *certiorari* be awarded to the end that the judgments of the Circuit Court of Appeals and the United States District Court may be reversed and the cause remanded to the latter Court for a new trial upon the issues made by the pleadings.

Respectfully submitted,

FRANK K. LEMON,
Attorney for Petitioner.

BRIEF.

I.

If it is the intention of the courts to grant a fair and impartial trial upon the issues presented by the pleadings in a civil action, it is prejudicial and reversible error for the trial court to permit the respondent, especially after warning, to introduce evidence of the fact that the petitioner carried insurance against automobile accidents and collisions.

Stewart & Company v. *Newby,* 266 Fed. 287, 295;

Brooke v. *Croson,* 58 F. (2nd) 885;

Clark v. *Hasselquist, et al.,* 304 Ill. App. 41, 46, 47, 48;

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George A. Fuller Co. v. *Nicholas J. Darragh,* 101 Ill. App. 664;

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Bishop v. *Chicago Junction Ry. Co.,* 289 Ill. 63, 67;

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Toombs v. *Texas Oil Co.,* 145 Misc. 762, 260 N. Y. Supp. 773;
Gose v. *Ballard,* Court of Civil Appeals of Texas (1928), 12 S. W. (2nd) 1067;
Osgood v. *Chicago & N. W. R. R. Co.,* 253 Ill. App. 465 at 467.

II.

In the case at bar, where the evidence of negligence and want of ordinary care was conflicting, and a verdict could have been sustained for either side in the absence of countervailing evidence, the rulings of the trial court should have been accurate and the injection of false issues should work a reversal of a judgment obtained thereby.

2 *R. C. L.* 253, Sec. 206;
Anlicker, et al. v. *Brethorst, et al.,* 329 Ill. 11, 160 N. E. 197;
Sertaut v. *Crane,* 142 Ill. App. 49;
New York Central R. R. Co. v. *Stevens,* 126 Ohio 395, 185 N. E. 542.

III.

The first testimony concerning petitioner's insurance against automobile accidents was introduced in an attempt to get an admission from petitioner that he said the collision was his fault. Petitioner could have been asked directly about this conversation without any evidence of petitioner's insurance getting before the jury. The next circumstance used as a vehicle to put the fact of petitioner's insurance before the jury was elicited by questions concerning an attempted settlement of the case, not consummated, together with evidence that respondents desired $4,000.00 damages. This was clearly incompetent and highly prejudicial.

Home Ins. Co. v. *The Baltimore Warehouse Co.*, 93 U. S. 527, 548 (23 L. Ed. 868, 871);
Garber v. *Levine*, 250 Mass. 489, 146 N. E. 21;
Outlook Hotel Co. v. *St. John*, 287 F. 115;
Arnold v. *Owens*, 78 F. (2nd) 495.

IV.

A verdict tinged with passion and prejudice is void in its entirety.

Nicholson & Sons v. *O'Donald*, 79 Ill. App. 195 at 200;
West Chicago St. R. R. Co. v. *Johnson*, 69 Ill. App. 147, 157;
Lowenthal v. *Streng*, 90 Ill. 74;
Chicago & N. W. Ry. Co. v. *Cummings*, 20 Ill. App. 333.

"Generally, where prejudicial error has been declared, it is found to have been due to some misconduct, or improper remarks, or questions of counsel, oft times repeated and calculated to influence or prejudice the jury."

Williams v. *Consumer's Co.*, 352 Ill. 51.

V.

The overwhelming weight of authority in almost every jurisdiction supports the contention that instructions on insurance, such as the trial court gave in the case at bar (Tr. 136) only make more emphatic the evil intended to be cured. As is noted in some of the cases, this has also been held applicable to objections of testimony.

Marrigold v. *Black River T. Co.*, 80 N. Y. Supp. 861, 862;
Wiersema v. *Lockwood & S. Co.*, 147 Ill. App. 33;
Rothenburg v. *Collins*, 146 N. Y. Supp. 762;
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